IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAWNEE NATION OF OKLAHOMA, WALTER R. ECHO-HAWK, *et al.*,
Plaintiffs;

v.

RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior, the **UNITED STATES BUREAU OF INDIAN AFFAIRS,** and the **UNITED STATES BUREAU OF LAND MANAGEMENT,**

Defendants.

Case No. 16-cv-697-JHP-TLW

FEDERAL RESPONDENTS' MOTION TO DISMISS

FEDERAL RESPONDENTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Federal Defendants, Ryan Zinke, in his official capacity as Secretary of the United States Department of the Interior ("Interior"); the Bureau of Indian Affairs ("BIA"); and the United States Bureau of Land Management ("BLM") (collectively "Federal Respondents") hereby move, pursuant to Rule 12 of the Federal Rules of Civil Procedure, 10th Circuit Rule 27.211, and Local Civil Rule 7.2, for an order dismissing Plaintiffs' claims against Federal Respondents in the First Amended Complaint, ECF No. 17, for lack of subject matter jurisdiction. This Motion is supported by the memorandum of points and authorities below and all arguments that may be presented in reply, at argument, or by leave of Court.

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I. INTRODUCTION

Plaintiffs, the Pawnee Nation and a number of individual tribal members, are owners of fractionated interests in allotted lands on the former Pawnee reservation. The majority owners of these allotted lands have leased the land for oil and gas development, and some of the tracts are currently producing oil and gas. Plaintiffs seek to stop any further oil and gas development, and to invalidate the existing seventeen leases and permits on these lands that they own fractional interests in.

To accomplish this, Plaintiffs raise a number of claims under the Administrative Procedure Act ("APA") challenging the BLM's and BIA's approvals of leases and permits, and other approvals related to oil and gas leasing. This Court lacks jurisdiction over many of those claims, and others fail to state valid claims for relief. First, Plaintiffs' claims related to BIA's approvals of oil and gas leases are barred for failure to exhaust administrative remedies, and for failure to identify a valid waiver of sovereign immunity. Second, Plaintiffs' claims under the American Indian Agricultural Resource Management Act ("AIARMA") do not state a viable claim for relief because the statute does not apply to oil and gas leasing or permitting. Finally, Plaintiffs have alleged that the BIA and BLM violated fiduciary trust duties, but have failed to identify a specific duty creating statute, regulation or order that can support their claim. As a result, all of Plaintiffs' claims relating to the seventeen Pawnee leases should be dismissed, and Plaintiffs' fourth and sixth causes of action based on AIARMA and a breach of trust duty should also be dismissed.

II. STANDARD OF REVIEW

"Federal courts are courts of limited jurisdiction . . . , possessing only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When considering a motion under Federal Rule of Civil Procedure 12(b)(1), the burden of establishing the court's subject-matter jurisdiction resides with the party seeking to invoke it, and that party has the burden of establishing jurisdiction by a preponderance of the evidence. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Federal subject-matter jurisdiction "cannot be consented to or waived, and its presence must be established in every cause under review in the federal courts." *Firstenberg v. City of Santa Fe*, 696 F.3d 1018, 1022 (10th Cir. 2012). If the Court, at any time, determines that it lacks subject-matter jurisdiction, the case should be dismissed. Fed. R. Civ. P. 12(h)(3).

A motion to dismiss for lack of subject-matter jurisdiction can take one of two forms: "(1) a facial attack on the sufficiency of the complaint's allegations as to subject-matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002). This Motion presents a facial attack on the sufficiency of the First Amended Complaint's allegations as to the Court's subject-matter jurisdiction. As such, the factual allegations advanced in the First Amended Complaint are assumed to be true for purposes of this motion. *Id*. This Motion also presents a challenge to the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, the Court may not presume the truthfulness of the complaint's factual allegations. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). A court has wide discretion to consider documents outside the complaint to resolve disputed jurisdictional facts under 12(b)(1). *Id*. In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion. *Sizova v. Nat. Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002).

In ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court assumes Plaintiffs' factual allegations to be true and determines whether they plausibly give rise to claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Plaintiff must show more than a sheer possibility that defendants have acted unlawfully—it is not enough to plead facts that are "merely consistent with" defendants' liability. *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim which is plausible—and not merely conceivable—on its face. *Id*. at 679–80; *Twombly*, 550 U.S. at 555. In addition, Plaintiffs must have a viable legal theory to support their claims. "[O]n a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

III. BACKGROUND

Plaintiffs are partial owners of allotted lands within the boundaries of the former reservation of the Pawnee Nation. Am. Compl. ¶¶ 7, 10, 12-21.[1] According to Plaintiffs, the BIA has approved seventeen leases (the "Pawnee Leases") that affect tracts in which Plaintiffs have a partial ownership interest. *Id.*; *see also* Ex. A (the Pawnee Leases).[2] Owners of allotted lands may enter into mineral leases on their lands, subject to approval by the Secretary of the Interior. 25 U.S.C. § 396. Leases entered into under 25 U.S.C. § 396 are governed by the regulations at 25 C.F.R. Part 212. Those regulations provide that appeals of BIA decisions are governed by 25 C.F.R. Part 2. 25 C.F.R. § 212.58 (citing 25 C.F.R. § 211.58). The regulations governing appeals provide that:

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[1] Federal Respondents do not admit that Plaintiffs actually own interests in the lands affected by the challenged leases. Only for purposes of this Motion to Dismiss, Federal Respondents accept the facts in the Complaint as true. Federal Respondents reserve the right to contest any of the facts cited herein at later stages of this litigation.

[2] According to Plaintiffs, they challenge the following leases: 14-20-207-12624, 14-20-207-12625, 14-20-207-12626, 14-20-207-12627, 14-20-207-12644, 14-20-207-12645, 14-20-207-12646, 14-20-207-12647, 14-20-207-12648, 14-20-207-12649, 14-20-207-12650, 14-20-207-12651, 14-20-207-12652, 14-20-207-12653, 14-20-207-12654, 14-20-207-12655, and 14-20-207-12656. True and correct copies of those leases are attached as Exhibit A.

> No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. § 704, unless when an appeal is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.

25 C.F.R. § 2.6. The seventeen Pawnee leases were approved by the BIA Superintendent between July 2013 and November 2013. Appeals from the Superintendent's decision are to the appropriate Regional Director (referred to as an "Area Director" in the regulations). *Id*. at § 2.4. Plaintiffs did not pursue any administrative appeal of the BIA approvals of the Pawnee leases.

In the years after the leases were approved, the lessees submitted Applications for Permits to Drill ("APDs") under the leases. BLM conducted Environmental Assessments ("EAs") for APDs that affect tracts in which Plaintiffs have ownership interests. Am. Compl. ¶ 56. On June 24, 2015, BLM issued the final EA and Finding of No Significant Impact ("FONSI") for the wells named Gertie #1-33MH; Gertie #2-33MH; and Gertie #3-33 MH (the "Gertie wells"). Ex. B. In addition, on June 24, 2015, BLM issued a final EA and FONSI for the wells named Double R9 #1-4MH; Double R9 #2-4MH; Double R9 #3-4MH (the "Double R9 wells"); Francis #1-9MH; and Francis #2-9MH (the "Francis wells"). Ex. C. On February 8, 2016, BLM issued a final EA and FONSI for wells named Pratt 5 #1-32MH and Taylor #1-5MH (the "Pratt" and "Taylor" wells). Ex. D. On August 11, 2015, BLM approved the APDs for Double R9 wells #2 and #3. Ex. E. On August 12, 2015, BLM approved the APDs for Double R9 #1, the Francis wells and the Gertie wells. Ex. F. On February 29, 2016, BLM approved the APD for the Taylor well. Ex. G.

IV. ARGUMENT

A. Plaintiffs Have Failed to Identify A Valid Waiver of Sovereign Immunity for Claims Regarding the Pawnee Leases.

The United States, as sovereign, is immune from suit, unless it consents to be sued. *United States v. Testan*, 424 U.S. 392, 399 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jacks*, 960 F.2d 911, 913 (10th Cir. 1992) (same). "Thus, if the [United States] has not consented to suit, the courts have no jurisdiction to either restrain the government from acting, or to compel it to act." *United States v. Murdock Mach. & Eng'g Co.*, 81 F.3d 922, 929-30 (10th Cir. 1996) (internal quote omitted). A waiver of the federal government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). Statutory text purporting to waive governmental immunity is strictly construed in favor of the sovereign. *Id.*; *see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547 (10th Cir. 2001).

The "defense of sovereign immunity is jurisdictional in nature, depriving courts of subject-matter jurisdiction where applicable." *Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 1290, 1295 (10th Cir. 2009). Plaintiffs assert the Court's jurisdiction pursuant to 28 U.S.C. § 1331. Am. Compl. ¶ 5. But, "[b]ecause general jurisdictional statutes, such as 28 U.S.C. § 1331, do not waive the Government's sovereign immunity, a party seeking to assert a claim against the government under such statute must also point to a specific waiver of immunity in order to establish jurisdiction." *Id.*; *see also City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 906-07 (10th Cir. 2004).

Apart from 28 U.S.C. § 1331, in the section of the Complaint titled "Jurisdiction and Venue," Plaintiff cites only Section 702 of the APA as providing this Court with jurisdiction. Am. Compl. ¶ 5. Section 702 of the APA does contain a limited waiver of sovereign immunity for two distinct types of claims against the United States: (1) claims where a person is aggrieved by agency action "within the meaning of a relevant statute;" and (2) claims where a "person suffer[s] a legal wrong because of agency action." The first type of waiver applies when judicial review is sought pursuant to a statutory cause of action arising separate and apart from the APA. With regard to its claims challenging the seventeen Pawnee Leases in the first, fourth, fifth and sixth causes of action Plaintiff cites no independent statutory cause of action. The second type of waiver, relevant in the present case, applies when judicial review is sought pursuant only to the general provisions of the APA.

"When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under general review provisions of the APA, the 'agency action' in question must be 'final agency action.'" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (citing 5 U.S.C. § 704). "Agency action is not 'final' for purposes of § 704 until 'an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule.'" *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233 n.9 (10th Cir. 2005) (quoting *Darby v. Cisneros*, 509 U.S. 137, 146 (1993)). Therefore, under Section 704 of the APA, "the federal courts may not assert jurisdiction to review agency action until the administrative appeals are complete." *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988) (citation omitted). As discussed in detail in the following section, Plaintiffs have not exhausted administrative remedies as required, and therefore, the challenged agency action is not "final" for the purposes of APA jurisdiction. Since Plaintiffs failed to identify any statute other than the APA which provides a cause of action against the United States, and there has been no final agency action, the APA does not waive sovereign immunity for Plaintiffs' claims challenging the Pawnee Leases in the first, fourth, fifth and sixth causes of action.

B. All of Plaintiffs' Claims Regarding the Pawnee Leases are Barred for Failure to Exhaust Administrative Remedies.

This Court does not have jurisdiction over Plaintiffs' claims related to the Pawnee leases because Plaintiffs have failed to exhaust administrative remedies with regard to those leases. Plaintiffs' first, fourth, fifth and sixth causes of action allege violations of the APA relating to BIA's approval of the seventeen Pawnee leases. Am. Compl. ¶¶ 74-76 (first cause of action); 85-88 (fourth cause of action); 90-91 (fifth cause of action); 93-95 (sixth cause of action).[3] Department of Interior regulations governing oil and gas leases require that a litigant exhaust administrative remedies before judicial review is available. Plaintiffs have not filed any administrative appeals regarding the lease decisions they challenge in the first, fourth, fifth, and sixth causes of action. As a result those claims must be dismissed.[4]

The exhaustion doctrine dictates that a party is not "entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *McKart v. United States*, 395 U.S. 185, 193 (1969) (citation omitted). Thus, exhaustion of administrative remedies is a necessary jurisdictional prerequisite to judicial review. *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1295-96 (10th Cir. 2003). "A party must exhaust administrative remedies when a statute or agency rule dictates that exhaustion is required."

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[3] Although Plaintiffs' sixth cause of action is titled "Failure to Comply with Trust Responsibilities," it alleges that "approval of the Pawnee leases . . . was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. Am. Compl. ¶ 95 (citing 5 U.S.C. § 706(2)(a)). Since the alleged APA violations in the sixth cause of action are premised on violations of NEPA, AIARMA, NHPA, and Executive Order 11,988, they are simply duplicative of the prior causes of action. Am. Compl. ¶¶ 93, 95. To the extent the sixth cause of action could be read to allege a cause of action for breach of a trust duty, it would still fail for the reasons explained in Sec. IV.D., below.

[4] Plaintiffs' fourth, fifth, and sixth causes of action challenge BLM's decisions on APDs and sundry notices in addition to the Pawnee Leases. Am. Compl. ¶¶ 84-95. Federal Respondents do not argue here that those claims with respect to APDs and sundry notices are barred for failure to exhaust administrative remedies. As explained in more detail below, some of those claims should be dismissed for other reasons, but the failure to exhaust argument is limited to claims relating to the seventeen Pawnee leases.

Coosewoon v. Meridian Oil Co., 25 F.3d 920, 924 (10th Cir. 1994) (citing *White Mountain Apache Tribe*, 840 F.2d at 677).

The exhaustion requirement "recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government that, agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." *United Tribe of Shawnee Indians*, 253 F.3d at 550 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute as stated in Woodford v. Ngo*, 548 U.S. 81, 85 (2006)). As explained by the Tenth Circuit, "the purposes of the doctrine of exhaustion of administrative remedies include avoidance of premature interruption of administrative process, allowing the Agency to develop the necessary factual background on which to decide the case, giving the Agency a chance to apply its expertise or discretion and [the] possibility of avoiding the need for the court to intervene." *Franks v. Nimmo*, 683 F.2d 1290, 1294 (10th Cir. 1982) (citation omitted); *see also St. Regis Paper Co. v. Marshall*, 591 F.2d 612, 613-14 (10th Cir. 1979).

A party is required to exhaust administrative remedies under the APA when expressly required by statute, or "when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby v. Cisneros*, 509 U.S. 137, 154 (1993). In the present case, exhaustion is mandated by United States Department of Interior ("Interior") regulations governing the Pawnee leases found in 25 C.F.R. Part 2 and 43 C.F.R. Part 4. The BIA regulations at 25 C.F.R. Part 212 provide that decisions of the Superintendent may be appealed pursuant to 25 C.F.R. Part 2. *See* 25 C.F.R. § 212.58 (providing that appeals are governed by 25 C.F.R. § 211.58, which in turn provide that appeals are governed by 25 C.F.R. Part 2). Under 25 C.F.R. Part 2, if an agency decision is subject to appeal to a superior authority within the Department, a party must appeal the decision to the highest authority within the agency before judicial review is available. *Coosewoon*, 25 F.3d at 924-25 (citing 25 C.F.R. § 2.6(a)); *see also* 43 C.F.R. § 4.314(a) ("No decision of [a] . . . BIA official that at the time of its rendition is subject to appeal to the Board, will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. [§] 704 . . . ."). Exhaustion "requires that a litigant 'complete the administrative review process' before seeking judicial review." *Gilmore v. Weatherford*, 694 F.3d 1160, 1169 (10th Cir. 2012) (quoting *Jones v. Bock*, 549 U.S. 199, 218 (2007)).

In this case, each cause of action related to the Pawnee leases cites to 5 U.S.C. § 706(2)(A), alleging that the BIA's approvals of the Pawnee leases were arbitrary and capricious. Am. Compl. ¶¶ 76 (first cause of action); 88 (fourth cause of action); 91 (fifth cause of action); 95 (sixth cause of action). Plaintiffs do not allege anywhere in their Complaint, however, that they exhausted administrative remedies with respect to the Pawnee leases. No administrative appeals have been filed with regard to any of the seventeen Pawnee leases challenged by Plaintiffs. This Court should find that because Plaintiff has not exhausted administrative remedies for the agency actions at issue as required by Interior regulations, and that all claims challenging the approvals of the Pawnee leases are not subject to judicial review under the APA. Plaintiffs have failed to exhaust administrative remedies, and the Court lacks jurisdiction over those claims. Accordingly, the first, fourth, fifth, and sixth causes of action as they relate to the Pawnee leases must be dismissed.

C. Plaintiffs Failed to State a Claim Under the AIARMA.

Plaintiffs' fourth cause of action under the American Indian Agricultural Resource Management Act ("AIARMA") fails as a matter of law. Plaintiffs contend that AIARMA requires BLM and BIA to make oil and gas leasing and permitting decisions that comply with

Pawnee tribal laws. Plaintiffs claim that because the approvals of the Pawnee leases and the associated APDs allegedly fail to comply with Pawnee Nation laws, the decisions violate AIARMA and are therefore arbitrary and capricious under the APA. However, Plaintiffs' cause of action lacks any legal basis whatsoever.

AIARMA recognizes the government-to-government relationship between the United States and Indian tribes and the general trust relationship to protect and conserve Indian agricultural lands consistent with the United States' fiduciary obligation. 25 U.S.C. §§ 3701-3746. AIARMA, as its name makes clear, however, is centered on the United States' participation in agricultural "land management activities" under the Act. *See* 25 U.S.C. § 3712 (titled "Indian Participation in Land Management Activities").

The statute defines "land management activities" as activities "in support of the management of Indian agricultural lands" such as "preparation of soil and range inventories," "irrigation delivery system development," "protection against agricultural pests," and "administration and supervision of *agricultural leasing and permitting* activities." 25 U.S.C. § 3703(12) (emphasis added). The statute provides that the definition includes, "but [is] not limited to" the listed definition. However, given the scope of the statute and the clear topical focus of the listed items, there is no plausible reading of the list that would expand it to cover oil and gas leasing activities. Other terms that would fall within the scope of "including but not limited to" must be of the same character. *Bloate. v. United States,* 559 U.S. 196, 209 (2010) (holding that a broad reading of the phrase "including but not limited to" "would violate settled principles of statutory construction because it would ignore the structure and grammar of [the statute], and in so doing render even the clearest of the subparagraphs indeterminate and virtually superfluous."); *see also United States v. Osage Wind, LLC,* No. 14-CV-704-JHP-TLW, 2015 WL

5775378, at *6 (N.D. Okla. Sept. 30, 2015) (same), *appeal docketed*, No. 15-5121 (10th Cir. Dec. 2, 2015). This point is highlighted by the fact that there is an expansive well-defined body of statutes and regulations specifically governing oil and gas leasing activities on federal lands. 25 U.S.C. § 396; 25 C.F.R. Part 212; 43 C.F.R. Part 3160. The AIARMA governs an entirely different class of leasing activities.

In carrying out these specific "land management activities," the "Secretary shall comply with tribal laws and ordinances pertaining to Indian agricultural lands," unless otherwise prohibited by federal law. *Id*. § 3712(b). AIARMA does not itself set forth specific trust duties and states that "[n]othing in this chapter shall be construed to diminish or expand the trust responsibility of the United States toward Indian trust lands or natural resources, or any legal obligation or remedy resulting therefrom." *Id*. § 3742. By its terms, AIARMA does not apply to oil and gas leasing and permitting activities that Plaintiffs challenge in their Complaint. Oil and gas leasing and permitting activities are governed by 25 U.S.C. § 396 and the regulations at 25 C.F.R. Part 212 (for leasing activities) and 43 C.F.R. Part 3160 (for oil and gas operations activities).

Plaintiffs' fourth cause of action therefore fails to state a valid claim for relief under Federal Rule of Civil Procedure 12(b)(6). Plaintiffs' fourth cause of action alleges that oil and gas leasing decisions did not comply with AIARMA because they failed to abide by Pawnee environmental laws. Am. Compl. ¶ 67, 69. But the provisions of AIARMA that require compliance with tribal laws address only "land management activities" which are specifically defined in the statute. 25 U.S.C. § 3712 (titled "Tribal participation in *Land Management Activities*")(emphasis added); 25 U.S.C. § 3703(12) (defining land management activities). Indeed, the regulations passed to implement AIARMA are regulations that govern *agricultural* leasing. 25 C.F.R. §§ 162, 166; *Fredericks v. United States*, 125 Fed. Cl. 404, 418 (2016) ("In 2001, the Interior Department promulgated regulations implementing AIARMA, codifying those rules at 25 C.F.R. §§ 162 (leases) and 166 (permits)"). Those regulations in Sections 162 and 166 deal explicitly and exclusively with agricultural leases and permits—not oil and gas leases. Nothing in the AIARMA amends or supersedes the long-standing statutes and regulations that govern oil and gas leasing administered by the BLM and BIA.

If the Court were to permit Plaintiffs' AIARMA claim to move forward, it would force the Court to assess whether oil and gas leases and permits were required to comply with a statute that does not apply to oil and gas leases. If Plaintiffs' theory that AIARMA applies to oil and gas leasing were correct, there is literally no activity that takes place anywhere on land that might be used for agriculture that would not be forced to comply with AIARMA. The plain text of the statute is clear that such a result is far beyond the scope of the statute. The statute's language is clear that it governs a narrow scope of activities specifically related to agriculture, not every activity that happens to occur on land that might be suitable for agriculture. Thus, even accepting all of Plaintiffs' factual allegations as true, they cannot state a valid claim for relief based on AIARMA to challenge leasing and permitting decisions to which the AIARMA by definition does not apply. Plaintiffs can prove no set of facts that would entitle it to relief on its fourth cause of action premised on a violation of AIARMA. *Brakebill v. Bank of Am. Corp.*, No. CIV-15-185-SPS, 2015 WL 5311281, at *2-3 (E.D. Okla. Sept. 11, 2015) (dismissing case for failure to state a claim because the statute identified in plaintiff's complaint did not apply and the conduct was specifically exempt from the statute in the complaint.).

D. To the Extent Plaintiffs' Sixth Cause of Action Alleges a Breach of Trust Duty, It Must Also be Dismissed In Its Entirety.

Plaintiffs' sixth cause of action alleges that, "by violating NEPA, Executive Order 11988,[5] NHPA, and the AIARMA," Federal Respondents "did not meet their trust responsibilities." Am. Compl. ¶ 93.[6] Plaintiffs also allege that BIA and BLM failed to engage in meaningful government-to-government consultation with the Pawnee Nation. *Id.* ¶ 94. Plaintiffs, however, do not—nor can they—identify trust duties imposed by the statutes they cite or any basis for their unspecified duty to meaningfully consult. It is well settled that agencies satisfy their trust obligations through their compliance with these particular statutes—there is no cause of action for a breach of a trust duty separate from the underlying compliance with the statute. Accordingly, Plaintiffs' sixth cause of action's alleged breach of duty based on NEPA, Executive Order 11,988, NHPA, and the AIARMA, or an unspecified duty to consult does not state a cause of action, and the Court should dismiss it in its entirety.

"The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law[.]" *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). Thus, in order to bring a claim for breach of trust, the Tribe "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (citation omitted); *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 757 (2016); *El Paso Nat. Gas Co. v. United States*, 774 F. Supp. 2d 40,

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[5] Floodplain Management (Executive Order), Exec. Order No. 11,988, 42 Fed. Reg. 26,951 (May 24, 1977), *order amended by*, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input, Exec. Order No. 13,690, 80 Fed. Reg. 6425 (Jan. 30, 2015).

[6] As discussed in Section V.B., above, Plaintiffs' sixth cause of action is alleged as a violation of the APA, citing 5 U.S.C. § 760(2) as the basis for the claim. Am. Compl. ¶ 95. However, in the Parties' Joint Status Report filed March 27, 2017, Plaintiffs allege that the sixth cause of action also raises a cause of action for breach of trust. ECF No. 17.

51–52 (D.D.C. 2011), aff'd, 750 F.3d 863 (D.C. Cir. 2014). This "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id*.

There is a "distinctive obligation of trust incumbent upon the Government in its dealings with [Indian tribes]." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983), *superseded by statute as stated in Todd Const, L.P. v. United States*, 85 Fed. Cl. 34, 38 (2008)). As other courts have recognized, however, the existence of the trust "relationship does not always translate into a cause of action." *See Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921 (9th Cir. 2008).

While the general trust relationship allows the federal government to consider and act in the tribes' interests in taking discretionary actions, it does not impose a duty on the federal government to take action beyond complying with generally applicable statutes and regulations. *Jicarilla Apache Nation*, 564 U.S. at 165 (2011). In the absence of specific fiduciary duties, the government's general trust responsibilities are discharged by compliance with generally applicable regulations and statutes. *See Gros Ventre Tribe v. United State*s, 344 F. Supp.2d 1221, 1226 (D. Mont. 2004) (citing *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998), *aff'd*, 469 F.3d 801 (9th Cir. 2006)). For example, the Ninth Circuit in *Morongo Band* concluded that the FAA sufficiently discharged its general trust responsibility to the Band by complying with general regulations and statutes, such as NEPA, when the Band could not otherwise point to a specific duty placed on the government with respect to the Band that would require more. 161 F.3d at 574-82. "Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995).

Here, Plaintiffs have not identified any statutes or regulations that give rise to a specific fiduciary duty. Plaintiffs allege only that the Federal Defendants have not complied with NEPA, Executive Order 11,988, NHPA, and AIARMA. Am. Compl. ¶¶ 93-94. None of these statutes set forth specific fiduciary duties. *See Okanogan Highlands Alliance*, 236 F.3d at 479 (In approving a gold mine, Bureau of Land Management satisfied its trust obligations by the agency's compliance with NEPA); *Morongo Band*, 161 F.3d at 574 (holding that the United States general trust relationship is discharged by compliance with the NHPA); *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 898 (D.C. Cir. 2014) (AIARMA does not "impose independently enforceable trust duties"); *see also Watershed Assocs. Rescue v. Alexander*, 586 F. Supp. 978, 988 (D. Neb. 1982) (citing a "lack of precedent holding that the Executive Order 11988 is enforceable through a private cause of action" and its "own finding that under relevant Eighth Circuit precedent, the executive order cannot be held to have the force and effect of law."); *but see Daingerfield Island Protective Soc. v. Babbitt*, 823 F. Supp. 950, 961 (D.D.C.), *aff'd in part*, 15 F.3d 1159 (D.C. Cir. 1993), supplemented, 40 F.3d 442 (D.C. Cir.), and *aff'd*, 40 F.3d 442 (D.C. Cir. 1994) (noting that "[o]ther courts are split on the enforceability of E[executive] O[rder] 11988 either privately or under the APA").[7] Accordingly, Plaintiffs' alleged breach of trust equates to a claimed violation of the general trust relationship, which does not set forth a cause of action. The Court should dismiss Plaintiffs' sixth cause of action in its entirety to the extent it is based on breach of trust duties, because Plaintiffs have not identified a specific statute or regulation giving rise to a trust duty.

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[7] However, even courts that have held that Executive Order 11,988 is independently enforceable, have held only that it is reviewable under the APA. *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997) ("We hold that . . . Executive Order[] 11988 [is] subject to judicial review under the Administrative Procedure Act."). Even if Plaintiffs might bring an APA challenge premised on Executive Order 11,988, there is no authority to support a breach of trust claim premised on the order, as it does not give rise to any specific fiduciary duties on the part of the United States.

V. CONCLUSION

Plaintiffs have failed to demonstrate that the Court has subject matter jurisdiction over any of Plaintiffs' claims relating to the Pawnee leases, and has failed to identify a valid waiver of sovereign immunity for those claims. Moreover, Plaintiffs claims premised on the AIARMA and breach of trust theories fail to state valid claims for relief and must be dismissed pursuant to Rule 12(b)(6). Therefore, Federal Respondents respectfully request that all claims related to the Pawnee leases in the Amended Complaint be dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction and that the fourth and sixth causes of action be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

Respectfully submitted this 15th day of May, 2017.

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